(25)

No. 06-278

In The

Supreme Court of the United States

DEBORAH MORSE;
JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF STUDENTS FOR SENSIBLE DRUG POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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February 20, 2007

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BRIEF ON BEHALF OF STUDENTS FOR SENSIBLE DRUG POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Students for Sensible Drug Policy respectfully submits this brief as *amicus curiae* in support of Respondent.

INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

Students for Sensible Drug Policy ("SSDP") is a non-profit, public interest advocacy organization comprising a grassroots network of students who are concerned about the impact drug abuse has on our communities and who believe that our current drug policies are failing young people. Founded in 1998, SSDP has thousands of student members in chapters at over 100 colleges and high schools throughout North America. SSDP helps empower young people to participate in the political process, educates young people about drug policy issues, and advocates for policies that treat drug abuse as a public health issue, not just a criminal justice issue. SSDP believes that protecting the rights of students to freely discuss drug policy and drug abuse issues, particularly in an academic setting, is essential to finding solutions to the problem of drug abuse.

All students – not just SSDP's members – should be able to freely and openly discuss drug policy and drug abuse issues on their campuses. But the Draconian legal standard Petitioners propose would allow school officials to punish student speech concerning a wide range of legitimate policy questions, from medicinal marijuana initiatives to student drug testing. SSDP files this brief to highlight the important perspective students bring to the drug policy debate and to demonstrate the harmful impact

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[1] Pursuant to Rule 37.6, *amicus curiae* Students for Sensible Drug Policy states that no counsel for a party authored this brief in whole or in part. No person or entity other than Students for Sensible Drug Policy or its counsel made a monetary contribution to the preparation or submission of the brief.

that reversal of the decision below would have on students' ability to discuss important drug policy and drug abuse issues.

SUMMARY OF ARGUMENT

Our nation's drug policies directly and intimately affect students' daily lives. Whether it be random drug testing for student athletes or federal financial aid conditioned on lack of any drug conviction, young people are significantly affected in their positions as students by drug-related policies. Students thus have a vested interest in understanding and discussing the underlying issues that guide and affect this country's drug policies. The First Amendment guarantees that their voice on these issues be protected.

Petitioners ask this Court to give school administrators a sizable net to cast over and suppress student speech about drug policy. Yet, such broad powers would not help solve the intractable problem of drug abuse. Indeed, the opposite is true: this country would not be able to evaluate the success of its drug policies without allowing the people most directly affected by those policies to freely discuss and debate them without fear of reprisal. The far-reaching authority sought by Petitioners would prevent students from engaging in legitimate political dialogue relating to heavily debated political issues.

Moreover, allowing school administrators to punish students based only on a subjective view that the speech is "inconsistent" with a school's mission statement would have a similar effect. Under the proposed standard, for example, a student would not be able to freely discuss any drug testing policy adopted at his or her own school for fear that a critical comment could result in punishment for allegedly undermining the school's anti-drug mission.

Petitioners' proposed drug exception to student speech is not, and should not be, the law. Students should enjoy the same First Amendment right to freely speak about issues of drug policy and drug abuse as they have to speak about any other political or public health issue. If

anything, student speech about issues that directly and intimately affect them – like drug policy – is deserving of even more rigid protection. Schools should be allowed to punish student speech only if it seriously disrupts the educational environment or clearly and unambiguously encourages illegal activity.

Contrary to *amici* D.A.R.E.'s assertions,[2] policy considerations do not justify silencing students on the important issues of drug policy and drug abuse by treating speech that mentions drugs differently from other speech. D.A.R.E. claims that the Ninth Circuit's decision would "threaten to make vital anti-drug policies unenforceable." But the studies they cite do not support this claim. Rather, government reviews have shown that two of these purportedly "vital policies" – the National Youth Anti-Drug Media Campaign and the D.A.R.E. program itself – are ineffective at reducing drug use among minors.

Permitting a school to punish the speech at issue in this case would impede, if not extinguish, legitimate debate about drug policy in public schools. Respondent's ambiguous and nonsensical statement could be interpreted as an attempt at a sarcastic political commentary about religion just as easily as – or perhaps even more easily than – it could be interpreted, as Petitioners would have it, as an endorsement of illegal drug use. It could equally be viewed as an attempt to obtain the spotlight during a highly-publicized event, as Respondent testified. Yet, Petitioners did not punish Respondent because they believed his banner was disruptive, but because they did not like the banner's content. If schools can punish this sort of vague and ambiguous speech because it may be interpreted by some as referring to a controlled substance

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[2] Brief for D.A.R.E. America, Drug Free America Foundation, Inc., National Families in Action, Save Our Society from Drugs, Hon. William J. Bennett, and General Barry R. McCaffrey as *Amici Curiae* in Support of Petitioners, filed Jan. 16, 2007 ("D.A.R.E. *Amici* Br."). The parties to the D.A.R.E. *Amici* Brief are collectively referred to as "D.A.R.E." or "*amici* D.A.R.E."

in a positive light, it will unconstitutionally chill student speech about drug policy issues.

ARGUMENT

I. STUDENTS HAVE A CONSTITUTIONAL RIGHT TO DISCUSS ISSUES RELATING TO DRUG POLICIES, ESPECIALLY BECAUSE DRUG POLICIES DIRECTLY AFFECT THEIR DAILY LIVES AND THUS RELATE TO SOME OF THEIR CORE POLITICAL CONCERNS.

A. Drug Policies Affect Students From Elementary School Through College.

The government's war on drugs has a more direct and intimate effect on students' daily lives than perhaps any other national policy issue. Petitioners and their *amici* are naïve to believe that they can shield students from a national conversation that takes place in both our schools and our homes.

During a school day, the average student is affected by a wide range of drug policies. Beginning in elementary school, children in 80% of all public school districts are taught about controlled substances through the strict, zero-tolerance approach of the D.A.R.E. program.[3] As *amici* D.A.R.E. observe, preventing drug abuse is "embodied in concrete policies in place at most schools and in federal anti-drug and educational funding laws that shape school curricula." D.A.R.E. *Amici* Br. at 21. Nearly one quarter of high school students are given drug tests in their schools[4] – in fact, annual federal funding for student

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[3] Marjorie E. Kanof, et al., *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, U.S. General Accounting Office Report, Jan. 15, 2003, at 4, *available at* http://www.gao.gov/new.items/d03172r.pdf.

[4] Ryoko Yamaguchi, et al., *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use*, Youth, Education & Society Occasional Paper 2, Inst. for Social Research, Univ. of Mich.,

(Continued on following page)

drug testing has increased five times since 2004, from approximately $2 million to $10 million.[5] Students are inundated with millions of dollars worth of government advertising about drugs each year – over $1 billion total since 1998.[6] After graduation, students who have suffered from drug abuse problems and hope to turn their lives around by going to college may be denied federal financial aid if they are convicted of a controlled substance offense. 20 U.S.C. § 1091(r) (2006).[7]

Some schools go beyond these common measures and employ more severe tactics, which they claim are geared towards drug prevention. In Goose Creek, South Carolina, for example, armed police officers stormed a public high school shortly before the start of the school day and, at gunpoint, ordered the students to the floor in order to conduct a drug search.[8] The principal requested the raid based on suspicions cast by a few students and teachers, and some surveillance videos showing nothing more than "students congregating under cameras, periodically walking into a bathroom with different students and

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2003, at 24, *available at* http://www.rwjf.org/files/research/YESOccPaper2.pdf.

[5] *School-Based Drug Testing Programs, Findings Status*, U.S. Dep't of Educ., 2006, *available at* http://www.ed.gov/programs/drugtesting/funding.html.

[6] *Making Further Continuing Appropriations for the Fiscal Year 2003 and Other Purposes*, Conference Report to H.J. Res. 2, 108th Cong., Feb. 13, 2003, at 1345, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr010.108.pdf.

[7] *See also* Katie Heinz, *Study: Drug Use Can Hurt College Financial Aid*, Waterloo/Cedar Falls Courier, May 1, 2006, *available at* http://www.wcfcourier.com/articles/2006/05/01/news/metro/c6d6ac7a21a1838686257161004dce0a.txt (reporting that nearly 200,000 students have been denied federal financial aid because of a drug conviction since the 2000-2001 school year).

[8] Mark Sage, *Armed Police Storm School in Drugs Raid*, The Press Ass'n, Nov. 7, 2003, at Home News.

coming out moments later."[9] Despite a thorough search involving drug-sniffing dogs, no drugs were found.[10] Similarly, zero-tolerance policies have led to severe punishment for trivial and even mythical offenses. Schools have suspended students or turned them over to police for possessing ordinary items that school officials said looked like or "imitated" drugs, such as a bag of dirt that officials said looked like marijuana[11] or a mixture of sugar and Kool-Aid that officials said "imitat[ed] drug activity."[12]

Students are also deeply affected by drug policies outside of school. Mandatory minimum drug sentencing laws, for example, have a significant impact on the children of offenders who are forced to grow up without one or both parents. Indeed, 67% of incarcerated parents – and 74% of incarcerated mothers – at the federal level are in prison due to a drug offense.[13] Young people similarly are affected by a provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which subjects persons convicted of a state or federal felony drug offense to a lifetime ban on receiving cash assistance and food stamps. Some students may become homeless when

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[9] Seanna Adcox, *Police Fail to Find Drugs in Stratford High Raid*, The Post and Courier, Nov. 7, 2003, at 1B.

[10] *Id.*

[11] Tony Hensley, *First Grader Punished for Bag of Dirt*, Heartland News (KFVS12), *available at* http://www.kfvs12.com/Global/story.asp?S=2919630.

[12] Tim Grant, *Pupils Trading Sweet Mix Get Sour Shot of Discipline*, Pittsburgh Post-Gazette, May 18, 2006, at B1; *see also, e.g.*, Justina Wang, *Schoolboy Charged with Felony for Carrying Powdered Sugar*, Chicago Sun Times, Feb. 11, 2006, at 29.

[13] Christopher J. Mumola, *Incarcerated Parents and Their Children*, U.S. Dep't of Justice, Office of Justice Programs, Aug. 2000, at 6, http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf; *see also* Shimica Gaskins, Note: *"Women of Circumstance" – The Effects of Mandatory Minimum Drug Sentencing on Women Minimally Involved in Drug Crimes*, 41 Am. Crim. L. Rev. 1533, 1550 (2004) ("In the end, the harsh consequences of mandatory minimums are mostly felt by the children [of incarcerated mothers.]").

family members run afoul of this one-strike policy that permits public housing agencies to evict entire families if one member of the family engages in drug activity. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002) (holding that the statute gives "local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity").

B. Students Are Often A Focal Point Of The National Drug Policy Debate.

In addition to policies that directly affect students, young people regularly find themselves at the center of the drug policy debate as the principal justification for executive and legislative action. President Reagan, for example, famously declared a "war on drugs" with the chief goal to protect young people from the dangers of drug abuse.[14] All three subsequent presidential administrations have similarly emphasized protecting young people as a central focus of their overall controlled substance strategies.[15] And members of Congress have advanced a

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[14] *See, e.g.*, *Transcript of President's State of the Union Message to the Nation*, The New York Times, Jan. 26, 1983, at A14 ("This Administration hereby declares an all-out war on bigtime organized crime and the drug racketeers who are poisoning our young people.").

[15] *See, e.g.*, Leon Harris and Daryn Kagan, *President Bush Nominates John Walters as Drug Policy Director*, Cable News Network (CNN), May 10, 2001, at Domestic (Transcript No. 01051001v54) (John Walters began his address after being nominated for the position of Drug Policy Director by stating, "[w]e will especially protect our children from drug use."); *Transcript of Presidential Radio Address to the Nation*, U.S. Newswire, Dec. 20, 1997 (President Clinton discussed his administration's "efforts to protect our children from drugs – the most dangerous enemy of childhood."); *Text of President's Speech on National Drug Control Strategy*, The New York Times, Sept. 6, 1989, at B6 (stating that the war on drugs must be won because "too many young lives are at stake").

wide range of specific drug policy measures, from the controversial mandatory minimum sentencing laws[16] to a law that subjects business owners of concert venues to criminal penalties based on drug violations by their patrons,[17] all in the name of young people. Moreover, Petitioners' *amicus* General Barry R. McCaffrey, as director of the Office of National Drug Control Policy ("ONDCP"), argued against state medicinal marijuana initiatives because he believed they "threaten[ed] to undermine efforts to protect our children from dangerous psychoactive drugs."[18]

C. Because Students Often Are At The Center Of Government Efforts To Prevent Drug Abuse, Their Constitutionally Protected Right Of Speech Is Of Particular Importance On Issues Relating To Drug Policy.

Because students have been thrust into the center of our nation's drug policy debate, their constitutional right to participate in that debate should be embraced and protected, not stifled. Students have a constitutionally protected interest in being able to freely share their views on drug policy issues. And those who are substantively involved in making drug policy should seek out these student views. After all, how can we accurately evaluate

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[16] Senator Orrin Hatch, ranking Republican Member of the Judiciary Committee, explained that "the reason why we went to mandatory minimums is because of these soft-on-crime judges . . . who just will not get tough on crime, get tough especially on pushers of drugs that are killing our youth." *Transcript*, PBS Frontline, Jan. 12, 1999, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html.

[17] Nick Anderson, *Rave Crackdown Targets Drugs, Not Music, Biden Says*, The Los Angeles Times, April 17, 2003, at Part 1, 22 (Senator Biden, the sponsor of the measure, said he was "only trying to deter illicit drug use and protect kids.").

[18] *Prepared Statement of General Barry R. McCaffrey, Director of National Drug Control Policy, Before the Senate Judiciary Committee*, Federal News Service, Dec. 2, 1996.

the success of our drug policies without allowing the people most directly affected to freely discuss and debate them? If anything, student speech about drug policy is deserving of even more careful and robust protection than other student speech because of the unique perspective and insights young people have on these national issues and because of the impact these policies have on them. As the 1990 National Commission on Drug-Free Schools explained: "[b]ecause any effort to eliminate drug problems must have the cooperation and support of young people, and because drugs have had such a significant impact on them, the Commission has given students' views much consideration in its findings and recommendations."[19] *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) ("The government's approach to th[e] problem [of drug abuse] is . . . a matter of great importance [and] criticism of the federal government's national drug control policy – even to the extent of advocating the legalization of certain drugs – implicates matters of public concern.").

D. Student Speech Relating To Drug Policy Should Be Protected Because Students Offer An Invaluable Perspective Regarding How To Curb Drug Abuse.

Students often experience disproportionate pain in seeing family members, friends, and classmates suffer from drug abuse. Accordingly, students – as much as other groups – appreciate the need for policies that will reduce

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[19] *Toward a Drug-Free Generation: A Nation's Responsibility, Final Report*, Nat'l Comm'n on Drug-Free Schools, U.S. Dep't of Educ., Sept. 1990, at 13.

the harmful impact that drug abuse and addiction have on our communities. As is true among the general public, however, there is disagreement among students about the best way to address the drug abuse problem and the effectiveness of our current approach. Drug abuse has remained an intractable problem – as *amici* D.A.R.E. correctly observe – *despite* the fact that we have spent over $78 billion for federal drug enforcement efforts since 2000 alone[20] and, as of 2003, over 325,000 people were incarcerated in state or federal prisons for drug offenses.[21]

Many students believe that the very real harms of drug abuse are not adequately addressed by current policies and that a new approach is needed. Students with this viewpoint should not be subjected to, nor should they fear, punishment by school officials for expressing their opinions about drug policy, particularly in an academic setting. *Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673, 675 (9th Cir. 1971) (Students have the "right to freely express themselves upon those issues which concern them.").

Indeed, SSDP has found that encouraging among young people a free and open dialogue about drug policy not only is an essential part of a healthy and legitimate debate about the policies themselves, but also promotes a broader civic engagement among students. Last spring, for example, members of the Chicago-based Francis W. Parker High School chapter of Students for Sensible Drug Policy organized a trip to a national summit on student drug testing in Wisconsin.[22] And in 2004, because of her active

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[20] *National Drug Control Strategy: FY 2007 Budget Summary*, The White House, 2006, at 9, http://www.whitehousedrugpolicy.gov/publications/policy/07budget/budget07.pdf.

[21] Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, U.S. Dep't of Justice, Bureau of Justice Statistics, Nov. 2006, at 9-10, http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

[22] *See* Jamaal Abdul-Alim, *Official Touts School Drug Tests: But Local Critics Call Random Screenings Costly, Ineffective*, The Milwaukee Journal Sentinel, April 26, 2006, at B3 ("Marissa Venturi . . . a member of Students for Sensible Drug Policy . . . called random

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work on the issue in her school, Amanda Gelender – a public high school student and SSDP member – testified before the California state senate during hearings on a drug-testing bill.[23]

Whatever one thinks about the merits of these students' views on drug testing, their engagement provides an invaluable contribution to the drug policy discussion, as well as to the educational process. By joining the public discussion about issues that affect them, students have the opportunity to experience in the real world the lessons about which they read in high school civics classes – experiences that may very well keep them interested and involved in our country's democratic process. *See Shanley v. N.E. Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 972 (5th Cir. 1972) ("One of the great concerns of our time is that our young people, disillusioned by our political processes, are disengaging from political participation.").

II. PUBLIC SCHOOL ADMINISTRATORS SHOULD NOT BE PERMITTED TO RESTRICT STUDENT SPEECH RELATING TO DRUG POLICY SIMPLY BECAUSE THEY HAVE A DIFFERENT VIEWPOINT.

Petitioners contend that school administrators should have the authority to restrict and punish any student speech that an administrator might "reasonably glean[ ]

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drug testing 'degrading' and said it would make her reluctant to participate in extracurricular activities[.]").

[23] *See* Chris DeBenedetti, *Student Addresses Legislators*, The Oakland Tribune, April 20, 2004, at More Local News (" 'I'll always vividly remember it,' Gelender said of her testimony. 'It's so rare to have a high school student testify in front of the state [Legislature]. Just being in Sacramento and in the Capitol Building was really, really exciting.' "); *see also* Zach Wierzenski, *Student Drug Testing Is Not the Answer*, The Virginian-Pilot, July 2, 2005, at B9 (editorial by an SSDP high school member who organized a coalition of parents and other students in opposition to a county drug-testing initiative).

. . . expresse[s] a positive sentiment about" a controlled substance. Brief for Petitioners, filed Jan. 16, 2007 ("Pet'r's Br.") at 25. But the authority they seek has virtually no limit and would allow school officials to punish students for engaging in undeniably political speech that may conflict with the views or opinions of the school administrators. This subjective standard would plainly lead to the divergent treatment of identical speech, and the overbroad prohibition of core political speech.

A. The Medicinal Marijuana Debate Exemplifies The Fatal Flaws In Petitioners' Proposed Standard.

During the past decade, perhaps the most prominent and hotly-debated drug policy issue has been the question whether seriously ill patients should be permitted to use marijuana for medicinal purposes. This scientific and political debate provides a clear picture of why Petitioners' proposed standard cannot stand constitutional muster. Since California passed its medicinal marijuana initiative in 1996, this Court has heard two medicinal marijuana-related cases, and at least ten states have passed laws similar to California's.[24] Students have as much interest in discussing these initiatives and court cases as anyone else, especially where, for example, they have a family member with cancer. Based on medical studies, these students may believe that marijuana provides an effective treatment for their family member's health condition. And having an opportunity to discuss the policy issues with friends and classmates in a

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[24] *See Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001); Alaska Stat. Ann. §§ 11.71.090, 17.37.010 to 17.37.080 (2007); Colo. Const. art. XVIII, § 14; Colo. Rev. Stat. § 18-18-406.3 (2006); Haw. Rev. Stat. Ann. §§ 329-121 to 329-128 (2006); Me. Rev. Stat. Ann. tit. 22, § 2383-B5 (2006); Mont. Code Ann. §§ 50-46-102 to 207 (2006); Nev. Const. art. IV, § 38; Or. Rev. Stat. §§ 475.300 to 475.346 (2006); R.I. Gen. Laws §§ 21-28.6-1 to .6-11 (2007); Vt. Stat. Ann. tit. 18, § 4471 (2006); Wash. Rev. Code §§ 69.51A.005 to 69.51A.902 (2007).

constructive environment, such as at school, may help them cope with the internal turmoil they encounter when dealing with an ill loved one.

Yet, Petitioners' proposed approach would permit administrators to punish any and all student speech that relates to the medicinal marijuana debate. Speech supporting medicinal marijuana laws or initiatives, almost by definition, "expresse[s] a positive sentiment about marijuana use" – namely, that marijuana use may sustain the health of individuals who suffer from cancer, AIDS, multiple sclerosis, or other debilitating illnesses. Leading up to the 2006 elections, for example, a public high school in South Dakota confiscated T-shirts in support of a South Dakota medicinal marijuana ballot initiative from two students for this very reason.[25] The shirts featured the message "Vote Yes on Initiated Measure 4" along with an image of a marijuana leaf. *Id.* The principal claimed that the inclusion of the leaf on the shirt violated school policy. One of the students contended that the picture on the shirt "should be protected as political speech" and argued that "he was campaigning for a ballot issue, not promoting the use of an illegal drug." *Id.* The principal responded that that was "absurd, . . . I'm not even going to dignify that argument with a response." *Id.* Although the principal there said that he would permit the wording on the shirt without the offending image, Petitioners' proposal in this case would not make even that concession: any speech that might be interpreted by a school administrator as expressing a positive sentiment about marijuana use could be banned from public schools.

The impact of Petitioners' approach would not be limited to statements in favor of medicinal marijuana initiatives. Petitioners claim that school administrators should be able to punish any student speech that an administrator might "reasonably glean" expresses a

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[25] *See S.D. School Confiscates Teens' Medical Marijuana T-Shirts*, The Associated Press, Nov. 11, 2006.

positive sentiment about a controlled substance. Pet'r's Br. at 25. That authority would encompass nearly any speech that relates to drug abuse or drug policy. *Id.* at 25 (arguing that such statements are "directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle").

It is not uncommon for government officials and advocates of zero-tolerance policies to mischaracterize legitimate policy arguments as attempts to encourage or promote drug use. For example, in 2004, SSDP submitted an FOIA request and accompanying fee waiver application for statistical information about the number of students who had been denied financial aid due to a drug conviction. On September 20, 2005, the Department of Education denied the fee waiver, stating that it cannot "conclude . . . that SSDP has no commercial interest in the disclosure sought" because SSDP's "campaign could directly benefit those who would profit from the deregulation or legalization of drugs . . . ."[26] On January 26, 2006, SSDP filed a lawsuit against the Department of Education, which the Department quickly settled prior to responding to the Complaint by agreeing to provide the information sought without charge.[27] Similarly, government officials often argue that reform policies themselves should not be enacted because they would send the "wrong message" to kids and encourage drug use.[28] In

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[26] *Students for Sensible Drug Policy v. United States Dep't of Educ.*, Case No. 1:06-CV-00140-EGS (D.D.C. 2006), Complaint ¶ 17, *available at* http://www.dcd.uscourts.gov/court-records.html.

[27] *Harmful Drug Law Hits Home: How Many College Students in Each State Lost Financial Aid Due to Drug Convictions?*, Students for Sensible Drug Policy, April 17, 2006, at 8, *available at* http://www.ssdp.org/states/ssdp-state-report.pdf.

[28] *See, e.g.*, Elvia Diaz, *Hopefuls Decry Medical Marijuana*, The Arizona Republic, Oct. 10, 2002, at 4B (reporting that U.S. drug czar John Walters said medicinal marijuana initiatives were "sending the wrong message to young people"); Jacob Sullum, *That Chemo Cachet: Medical Marijuana and Kids*, Reason Magazine, Jan. 2006, *available at* http://www.reason.com/news/printer/33056.html/ (reporting that ONDCP

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this atmosphere – where the Department of Education implies SSDP's campaign to repeal a law denying financial aid to students who are trying to recover from drug abuse means the organization is financially entangled with "those who would profit from . . . the legalization of drugs" (*i.e.*, drug dealers) – it is difficult to imagine any drug policy speech that school administrators would not be able to suppress under Petitioners' proposed standard.

B. Petitioners' Proposal Cannot Withstand Constitutional Scrutiny, As Evidenced By Past Cases.

The recent Second Circuit case *Guiles v. Marineau* provides an especially instructive example of how Petitioners' "reasonably glean" approach would allow a school official to punish legitimate political speech simply for containing an ambiguous reference to a controlled substance. *See Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006). There, a student wore a T-shirt criticizing President Bush. It read "George W. Bush, Chicken-Hawk-in-Chief" and featured an image of President Bush's face along with various other images, including three lines of cocaine and a martini glass. *Id.* at 322. School officials claimed the shirt violated its dress policy based on "the images of the drugs and alcohol and the word 'cocaine . . . .'" *Id.* at 323. The district court held for the school district, finding that the images were "plainly offensive or inappropriate," but the Second Circuit reversed. Petitioners criticized *Guiles* in their reply memorandum in support of their *certiorari* petition, asserting that *Guiles* "adopt[ed] the Ninth Circuit's destabilizing approach." Petitioner's Reply Memorandum, filed Oct. 9, 2006, at 5. Tellingly, their opening merits brief was nearly silent on *Guiles*. Indeed, far from demonstrating fault in the Ninth Circuit's decision, *Guiles* reveals the dangerousness of the

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said the California medicinal marijuana initiative sent "the wrong message to our children").

approach Petitioners advance. Petitioners' standard would create a drug exception to student speech whereby a student could be punished for any ambiguous image of, or reference to, a controlled substance, even an image or reference that is unquestionably political and possibly "anti-drug." *See Guiles*, 461 F.3d at 329 (finding that the students' shirt appeared to relate an anti-drug message).[29]

Granting school administrators the power to punish students anytime their speech could possibly be interpreted as expressing a positive sentiment about a controlled substance would mean that a policy area intimately affecting them would be off-limits to free debate. Under Petitioners' view, the more an issue impacts students, the less the Constitution protects a student's right to freely speak about it. This is not, and should not be, the law, particularly in light of the significant interests students have in discussing and debating approaches to solving the problem of drug abuse. *See supra* at 4-11; *see also Tinker*, 393 U.S. at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to

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[29] Petitioners' *amicus* the United States argues that a school should be allowed to suppress a banner like Mr. Frederick's "even if [it] were somehow understood to advocate legalization of marijuana[.]" Brief for United States as *Amicus Curiae* Supporting Petitioners, filed Jan. 16, 2007, at 27. Yet, whether marijuana should or should not be legalized is a political question that should be as open to legitimate debate among students as any other political issue. *See Shanley*, 462 F.2d at 972 (noting that "the general subject[ ] of marijuana [is a] . . . widely-publicized, widely-discussed, and significant issue"). This is especially true in Alaska, where, as the court below noted, Alaska court decisions and "repeated referenda about whether, and to what extent, to criminalize or legalize marijuana" make the issue of marijuana legalization particularly salient. *Frederick v. Morse*, 439 F.3d 1114, 1118 n.4 (9th Cir. 2006); *see also id.* at 1122 n.44 ("By [Petitioners'] standard, distributing photocopies of the Alaska Supreme Court decision [that] declared that there is 'no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of marijuana,' would also undermine the school's anti-drug mission.").

the expression of those sentiments that are officially approved."). This Court should not accept Petitioners' invitation to create a drug exception to students' First Amendment rights. *See Hatter*, 452 F.2d at 675 (courts should not "distinguish between issues and . . . select for constitutional protection only those which [they] feel[ ] are of sufficient social importance").

C. Petitioners' Proposed Approach Would Prevent Students From Freely Discussing Their Own School's Drug Policies.

Petitioners contend that schools should be able to prohibit student speech about drugs or drug policy that – in their view – is "inconsistent with the mission of schools to promote healthy lifestyles (including seeking at every turn to combat substance abuse)." Pet'r's Br. at 28. Such authority would permit school officials to punish a wide range of political speech. *See Frederick*, 439 F.3d at 1120 ("All sorts of missions are undermined by legitimate and protected speech . . . a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing that [there is] less heart disease among moderate drinkers and teetotalers . . . .").

If a school can punish students for speech that is inconsistent with the school's mission or policies, students will not be able to openly discuss their own school's drug-testing policies, even if that discussion could benefit the effectiveness of the program. Student drug testing at schools is another heavily-debated drug policy issue in this country and has been the subject of two cases before this Court in the last twelve years. *See Bd. of Educ. of Indep. Sch. Dist. No. 9 v. Earls*, 536 U.S. 822 (2002) (holding that suspicionless drug testing of students who participate in extracurricular activities is constitutional); *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that student athletes had a decreased expectation of privacy and that suspicionless drug testing of such students is constitutional). The issue has become even more prominent following President Bush's 2004 State of the

Union Address, in which he highlighted random student drug testing as a key part of his national drug control strategy.[30] The Office of National Drug Control Policy has held drug-testing summits in cities across the country to promote student drug testing and to "engage local communities in a productive dialogue about the dangers of youth substance use and the efficacy of developing and implementing random student drug-testing programs."[31]

Petitioners' proposal also could result in school administrators' preventing students from forming clubs or groups that provide a forum to discuss drug policy issues. Indeed, at least one school has already attempted to rely on this rationale to stop the formation of an SSDP chapter. In autumn 2006, Devon Defazio, a high school junior at a public school in Clearwater, Florida, attempted to start an SSDP chapter because of his interest in the student drug-testing issue. The school's principal, however, refused to approve the chapter, contending it would be inconsistent with the school's zero-tolerance drug policies. The principal took this position despite the fact that one of SSDP's primary concerns is the adverse impact that drug abuse has on our communities.[32] After months of discussion, including repeated phone calls and emails from SSDP's Executive Director to the principal assuring him that SSDP does not endorse drug use, the principal finally relented and allowed Mr. Defazio to start his group. If Petitioners' broad standard is adopted, however, high school principals

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[30] *See* Jim Wrinn, *Catawba Ponders Student Drug Test: County Schools Battle Teen Use, Officials Have Many Questions, Are Yet to Determine Who Would be Tested and How*, Charlotte Observer, Feb. 8, 2004, at 1V (noting that drug testing had become an issue of "local and national interest since President Bush, in his State of the Union address last month, called on Congress to expand funding for school drug testing from $2 million to $23 million").

[31] *White House Office of National Drug Control Policy to Host Random Student Drug-Testing Summits*, State News Service, Jan. 23, 2007.

[32] *See Mission and Values Statements*, Students for Sensible Drug Policy, http://www.ssdp.org/about/.

seemingly would be free to ban students from forming school clubs or groups to discuss drug policy issues, anytime the principal believes the discussions would be "inconsistent with" the school's anti-drug mission or the policies that implement that mission. School administrators should not be allowed to stifle legitimate student speech with which they personally disagree under the guise of claiming that it is inconsistent with the school's policies. *See Healy v. James*, 408 U.S. 169, 187 (1972) (holding that college president's "mere disagreement . . . with [a student] group's philosophy affords no reason to deny it recognition"); *Shanley*, 462 F.2d at 972 ("Perhaps newer educational theories have become in vogue since our day, but our recollection of the learning process is that the purpose of education is to spread, not to stifle, ideas and views.").

D. Having Broad Authority To Suppress Student Speech Relating To Drug Policy Will Not Help Schools Prevent Drug Abuse.

Amici D.A.R.E. argue that a drug exception to student free speech is warranted because it is necessary to prevent drug abuse. *See* D.A.R.E. *Amici* Br. at 12-17. D.A.R.E. goes so far as to claim that if the Ninth Circuit's ruling is allowed to stand, it would "threaten[ ] to make vital anti-drug policies unenforceable." *Id.* at 4. Although D.A.R.E. is correct that schools and parents can help reduce student drug abuse by "expos[ing students] to drug or alcohol prevention messages," *see id.* at 11, they offer no evidence to support their striking claim that silencing students on the important issues of drug policy and drug abuse is necessary, or even helpful, to combat the drug abuse problem. In fact, just the opposite is true: open discussion about drug policy and drug abuse gives students the opportunity to learn more about the issues and to make informed decisions.

Nor is there evidence to support D.A.R.E.'s more modest assertion that programs promoting hard-line zero-tolerance messages to students are themselves "vital"

drug policies. Indeed, recent government studies have shown that the two largest such programs fail to reduce drug use among young people. A United States General Accounting Office examination of six long-term studies of the D.A.R.E. program revealed that there were "no significant differences in illegal drug use between students who received DARE . . . and students who did not . . . ."[33] Similarly, a study funded by the National Institute on Drug Abuse found that the federal anti-drug advertising campaign was not effective in reducing drug use among young people. Specifically, the study revealed "little evidence of direct favorable campaign effects on youth" and found that the campaign's effects on "social norms and perceptions of other kids' use of marijuana . . . were consistently in an *unfavorable direction*, i.e., higher exposure [to the campaign] leading to weaker anti-drug norms. [Emphasis added.]"[34]

Ultimately, there is very little support for D.A.R.E.'s claim that suppressing student speech is necessary to enforce vital anti-drug policies. Indeed, the policy arguments advanced by D.A.R.E. do not justify taking the highly unusual step of treating student speech that mentions drugs differently from other student speech under the First Amendment.

III. PUNISHING RESPONDENT'S SPEECH WOULD STIFLE LEGITIMATE STUDENT SPEECH ABOUT DRUG POLICY.

Whether under Petitioners' proposed standard or one that is less restrictive, permitting Petitioners to punish

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[33] Marjorie E. Kanof, et al., *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, U.S. General Accounting Office Report, Jan. 15, 2003, at 2, *available at* http://www.gao.gov/new.items/d03172r.pdf.

[34] Robert Orwin, et al., *Evaluation of the National Youth Anti-Drug Media Campaign: 2004 Report of Findings*, Westat, June 2006, at xv, *available at* http://www.nida.nih.gov/DESPR/Westat/NSPY2004Report/Vol1/Report.pdf.

Respondent based on his vague and nonsensical statement would chill legitimate debate in public schools about drug policy. Respondent's speech neither directly nor even necessarily advocated drug use. Indeed, his uncontroverted testimony is that he did not intend to encourage or support drug use. The most natural understanding of Respondent's statement is exactly what he said it was: a nonsensical absurdity designed to garner attention. *See Frederick*, 439 F.3d at 1116 (noting that Mr. Frederick described the words on the banner as "just nonsense" that was "designed to be meaningless and funny, in order to get on television"). Even viewed in the worst light, it is difficult to discern much more from the phrase "BONG HITS 4 JESUS" than an immature distraction. Indeed, the phrase could more easily be interpreted as an attempt at a sarcastic criticism of religion than as an endorsement of drug use. Respondent's ambiguous phrase is a far cry from student speech that directly "advocates breaking the law[.]" D.A.R.E. *Amici* Br. at 14. Given what Respondent actually said, punishing speech such as his under any standard, in the absence of an actual disruption of school activities or a statement that clearly advocates the use of illegal drugs, would improperly stifle student speech about drug policy.

If school administrators are allowed to punish a nonsensical statement simply because it mentions a controlled substance (or a term associated with a controlled substance) and an administrator claims it is "pro-drug," it will be impossible for students to know what speech falls on what side of the line. Students who want to discuss medicinal marijuana, mandatory minimum drug sentences, random drug testing of student athletes, or other drug policy reform ideas would be in constant fear of punishment, concerned that an administrator might wrongly interpret their speech as being in favor of breaking the law. *Williams v. Spencer*, cited by Petitioners, nicely illustrates the difference between speech that amounts to a direct, unambiguous endorsement of illegal activity, and the phrase on Respondent's banner. *See Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980). In

Williams, the Fourth Circuit held that a school could prohibit distribution of an independent student newspaper that contained a paid advertisement for illegal drug paraphernalia. *Id.* at 1203. In reaching its decision, the court emphasized that the speech at issue was an unambiguous endorsement of drug use and "quite different from . . . a school prohibit[ing] the distribution of a publication containing an article of some literary value that may examine drugs and drug use. The printed material in issue here was paid for by a store seeking to profit from its encouragement of the use of drugs." *Id.* at 1206.

The distinction drawn in *Williams* is important to consider in deciding this case. So long as the student speech at issue may have some literary value or other similar value, such as political commentary, schools should not be permitted to punish that speech simply because it may also be interpreted as expressing a vague and nonsensical positive sentiment about drug use. Punishing students for clear and unambiguous statements that encourage their fellow students to engage in illegal activity does not pose the danger to important political speech that punishing Respondent's speech does, because it would require more than just an administrator's reasonable belief. By contrast, a legal standard that permits schools to punish students for statements that could be reasonably interpreted as political, nonsensical, or pro-drug has no limits. For such speech, *Tinker* provides more than adequate discretion for schools to punish speech that crosses the line from a nonsensical joke or satirical political statement into a material disruption of the educational environment or a clear endorsement of illegal activity. *See Tinker*, 393 U.S. at 513 (holding that schools may punish speech "in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others").

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 20, 2007